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## The North Carolina Supreme Court Engages in Stealthy Judicial Legislation: *Doe v. Holt*

Stealth is defined as “artfully sly action.”<sup>1</sup> When the government wanted to find a way to fly aircraft over other countries without the aircraft being detected, it built a stealth bomber: an aircraft that radar tracking systems cannot detect, even though it is visible to the naked eye. Similarly, when the Supreme Court of North Carolina wanted to do justice in a case where a father had raped and sexually molested his two daughters repeatedly, it created an artfully sly way to legislate judicially.<sup>2</sup> Instead of modifying or abolishing the doctrine of parent-child immunity—“‘impermissible judicial legislation’”<sup>3</sup> in its eyes—the court construed precedent in a manner that would engender the same result. In *Doe v. Holt*,<sup>4</sup> the North Carolina Supreme Court held that the parent-child immunity doctrine did not bar tort claims arising from a parent’s willful and malicious conduct.<sup>5</sup> The court stated that this holding was consistent with the parent-child immunity doctrine as adopted in 1923 in *Small v. Morrison*.<sup>6</sup> Careful analysis reveals, however, that the court probably intended the doctrine to bar claims for intentional torts when the doctrine was adopted in *Small*.<sup>7</sup> Thus, in effect, the court’s decision in *Holt* was not an application of the doctrine as it had been adopted in 1923, but rather a delineation of one more exception to the decaying doctrine of parent-child immunity.<sup>8</sup>

This Note examines the North Carolina Supreme Court’s holding in *Holt*.<sup>9</sup> The Note then recounts the North Carolina judiciary’s adoption and application of the parent-child immunity doctrine since 1923, including an analysis of the North Carolina courts’ overt resistance to modifying or abolishing the doctrine as it was adopted.<sup>10</sup> The Note identifies

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1. WEBSTER’S NEW WORLD DICTIONARY 732 (2d concise ed. 1982).

2. Although traditionally judicial legislation has referred to the court’s review of statutes, BLACK’S LAW DICTIONARY 761 (5th ed. 1979), this Note recognizes that courts also think of this term as applying to modification or abolition of judicial doctrines where the legislature has acted in the matter. *Lee v. Mowett Sales Co.*, 316 N.C. 489, 494-95, 342 S.E.2d 882, 885-86 (1986); see *infra* note 145.

3. *Doe v. Holt*, 332 N.C. 90, 93, 418 S.E.2d 511, 513 (1992) (quoting *Lee*, 316 N.C. at 494, 342 S.E.2d at 885).

4. *Id.*

5. *Id.* at 96, 418 S.E.2d at 514.

6. *Id.* (referring to *Small v. Morrison*, 185 N.C. 577, 118 S.E. 12 (1923)).

7. 185 N.C. 577, 118 S.E. 12 (1923); see *infra* notes 63-71 and accompanying text.

8. Exceptions to the doctrine have the effect of allowing a suit.

9. See *infra* notes 15-48 and accompanying text.

10. See *infra* notes 63-128 and accompanying text.

five factors courts should use when reviewing legislation<sup>11</sup> and suggests that courts do not need to defer to legislative *inaction*.<sup>12</sup> The Note encourages the North Carolina General Assembly to recognize that the North Carolina Supreme Court has had to engage in a stealth mission of judicial legislation to ensure justice.<sup>13</sup> The Note concludes that the legislature should either abolish the doctrine of parent-child immunity, or, at a minimum, make a plain statement about its intent to retain the doctrine, clarifying the effect of *Holt* on the immunity.<sup>14</sup>

In *Holt*, a biological father repeatedly raped and sexually molested his two unemancipated daughters, with whom he resided, beginning in 1980 when the sisters were five and six years old.<sup>15</sup> The abuse continued for nine years.<sup>16</sup> The trial court convicted the father after he pled guilty to criminal charges of second degree rape and second degree sexual offense.<sup>17</sup> While he was in prison, the sisters filed a civil tort action through their guardian ad litem to recover damages from their father for their permanent physical and emotional damages.<sup>18</sup>

On the theory that the parent-child immunity doctrine would bar the action, the trial court dismissed the case.<sup>19</sup> The North Carolina

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11. See *infra* notes 137-40 and accompanying text.

12. See *infra* notes 143-49 and accompanying text.

13. See *infra* notes 150-63 and accompanying text.

14. See *infra* notes 164-91, 195-98 and accompanying text.

15. *Holt*, 332 N.C. at 92, 418 S.E.2d at 512.

16. *Id.*

17. *Id.*

A person is guilty of rape in the second degree if the person engages in vaginal intercourse with another person: (1) By force and against the will of the other person; or (2) Who is mentally defective, mentally incapacitated, or physically helpless, and the person performing the act knows or should reasonably know the other person is mentally defective, mentally incapacitated, or physically helpless. Any person who commits the offense defined in this section is guilty of a Class D felony.

N.C. GEN. STAT. § 14-27.3 (1986).

A person is guilty of a sexual offense in the second degree if the person engages in a sexual act with another person: (1) By force and against the will of the other person; or (2) Who is mentally defective, mentally incapacitated, or physically helpless, and the person performing the act knows or should reasonably know the other person is mentally defective, mentally incapacitated, or physically helpless. Any person who commits the offense defined in this section is guilty of a Class D felony.

*Id.* § 14-27.5.

18. *Holt*, 332 N.C. at 92, 418 S.E.2d at 512. The daughters' complaint alleged that "[d]uring the period 1980 to 1989 the defendant committed acts toward the minor plaintiffs constituting assault and battery and intentional infliction of physical, mental and emotional distress." Plaintiffs' Complaint at 5, *Holt* (90 CVS 2282).

19. *Holt*, 332 N.C. at 92, 418 S.E.2d at 512. The doctrine of parent-child immunity generally prohibits a child from maintaining an action for damages against a parent and vice versa. See *infra* notes 49-62 and accompanying text.

Court of Appeals, however, reversed the order of the trial court.<sup>20</sup> The court of appeals concluded that the doctrine did not bar the suit for three reasons. First, neither the court of appeals nor the supreme court had applied the immunity to civil suits involving criminal actions and "indications have been that they would not."<sup>21</sup> Second, the court cited dicta in other cases stating that the immunity doctrine would not be applicable where there was a willful and malicious injury of the child.<sup>22</sup> Finally, "the father's sexual assaults were so destructive of the family relationship as 'to eliminate the . . . public policy behind the parental immunity rule.'"<sup>23</sup> The father appealed to the Supreme Court of North Carolina.

The North Carolina Supreme Court affirmed the court of appeals, holding that the parent-child immunity doctrine, as it has existed in North Carolina since its judicial adoption in 1923,<sup>24</sup> did not bar tort claims for injuries a parent willfully and maliciously inflicts on unemancipated minors.<sup>25</sup> Justice Mitchell, writing for the majority, noted that the parent-child immunity doctrine was applied first in North Carolina in *Small v. Morrison*.<sup>26</sup> He cited *Lee v. Mowett Sales Co.*<sup>27</sup> for the rule purportedly enunciated in *Small*: "[A]n unemancipated minor child may not maintain an action based on ordinary negligence against his parents."<sup>28</sup> The *Holt* court then found the father's acts to be both willful and malicious which, being beyond the bounds of ordinary negligence, meant that the parent-child immunity doctrine would not shield the father from suit.<sup>29</sup> The court emphasized that its intention was to apply the doctrine as it has existed since *Small* until the legislature limits or abolishes the doctrine.<sup>30</sup> The court believed that for it to create an exception or abolish the doctrine would be "impermissible judicial legisla-

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20. *Doe v. Holt*, 103 N.C. App. 516, 517, 405 S.E.2d 807, 808 (1991), *aff'd*, 332 N.C. 90, 418 S.E.2d 511 (1992).

21. *Id.*

22. *Id.*; see *infra* note 127 and accompanying text.

23. *Holt*, 103 N.C. App. at 518, 405 S.E.2d at 808 (citing *Wilson v. Wilson*, 742 F.2d 1004, 1005 (6th Cir. 1984)). The primary public policy supporting parent-child immunity is the promotion of family harmony. See *infra* text accompanying note 52.

24. See *infra* note 63 and accompanying text.

25. *Holt*, 332 N.C. at 96, 418 S.E.2d at 514.

26. 185 N.C. 577, 118 S.E. 12 (1923). *Small* was a negligence suit brought by a child against his parent. *Id.* at 578, 118 S.E. at 12; see *Holt*, 332 N.C. at 92-93, 418 S.E.2d at 512.

27. 316 N.C. 489, 342 S.E.2d 882 (1986).

28. *Id.* at 491, 342 S.E.2d at 884. *Lee* involved a negligence suit by a child against the manufacturer of a lawnmower, who in turn sought contribution from the child's father. *Id.* at 498, 342 S.E.2d at 883; see *infra* notes 121-28 and accompanying text; *Holt*, 332 N.C. at 93, 418 S.E.2d at 512.

29. *Holt*, 332 N.C. at 96, 418 S.E.2d at 514.

30. *Id.* at 93, 418 S.E.2d at 513.

tion."<sup>31</sup> Nevertheless, the court realized that equity demanded that the action be allowed:

It would be unconscionable if children who were injured by heinous acts of their parents such as alleged here should have no avenue by which to recover damages in redress of those wrongs. Where a parent has injured his or her child through a willful and malicious act, any concept of family harmony has been destroyed. Thus, the foremost public purpose supporting the parent-child immunity doctrine is absent . . . .<sup>32</sup>

Attempting to thwart the landslide of cases that this opinion could precipitate, Justice Mitchell warned that this decision should not be interpreted to allow courts to scrutinize the "reasonable chastisement" of a child.<sup>33</sup>

Justice Meyer concurred only with the court's judgment, for while he recognized that "the facts of this case are so egregious that to deny recovery would border the unconscionable,"<sup>34</sup> he felt that the majority's holding was not the law of *Small* as the court declared, but rather a judicial exception to the parent-child immunity doctrine.<sup>35</sup> He feared the number of cases that would be "spawned" by the majority's opinion and questioned how the law delineated by the majority would be applied.<sup>36</sup> Justice Meyer attacked the majority's reasoning: "Since the doctrine's inception, the bench and bar of the state have understood the doctrine of parent-child immunity to apply to all actions for personal injuries, however they were caused."<sup>37</sup> According to Justice Meyer, the holding of the majority was justified not as an application of the doctrine adopted in *Small*, but as a court-created exception to the doctrine of parent-child immunity.<sup>38</sup> He further asserted that the legislature is the more appro-

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31. *Id.* at 93, 418 S.E.2d at 512-13.

32. *Id.* at 96-97, 418 S.E.2d at 514-15.

33. *Id.*

34. *Id.* at 98, 418 S.E.2d at 515 (Meyer, J., concurring in result).

35. *Id.* at 98-100, 418 S.E.2d at 516 (Meyer, J., concurring in result).

36. *Id.* at 100, 418 S.E.2d at 516 (Meyer, J., concurring in result).

37. *Id.* at 98, 418 S.E.2d at 515 (Meyer, J., concurring in result).

38. "I believe that the majority errs in concluding that it is not recognizing an exception but simply discovering that the doctrine never applied at all except in cases involving 'ordinary negligence.'" *Id.* (Meyer, J., concurring in result). Additionally, Justice Meyer questioned why, since the court claimed only to be applying the doctrine as it had existed (i.e., only barring claims of ordinary negligence), the majority inquired into the willful and malicious nature of the rapes and sexual molestations given that they clearly involved conduct more egregious than ordinary negligence. *Id.* (Meyer, J., concurring in result). Justice Meyer felt that, since the majority specifically "limit[ed] its holding to 'willful and malicious' acts . . . [r]ather than flatly holding the doctrine is inapplicable to all acts . . . beyond 'ordinary negligence,'" it obviously was creating an exception to the doctrine rather than interpreting it. *Id.* (Meyer, J., concurring in result).

priate government body to address changes in the law that involve public policy concerns.<sup>39</sup>

Justice Meyer used a three-pronged argument to establish that the parent-child immunity doctrine as it existed in North Carolina at the time of the decision would bar the *Holt* suit. Initially, he asserted that the holding of *Small v. Morrison* was not limited to cases of ordinary negligence.<sup>40</sup> "Though the facts in *Small* involved negligently inflicted injuries, the Court's reasoning and holding show that the doctrine, as adopted in North Carolina, is not nearly as narrow."<sup>41</sup> Justice Meyer noted that the *Small* court cited with approval a case barring the suit of a minor against her father, who had been convicted of raping her.<sup>42</sup> Additionally, Justice Meyer stated that, in cases since *Small*, only dicta has limited the doctrine to cases of ordinary negligence.<sup>43</sup> He therefore reasoned that since "none of them distinguished or overruled *Small*, . . . none is controlling in this case."<sup>44</sup> Finally, Justice Meyer commented that prior to the decision in *Holt*, neither appellate court had allowed a child to recover damages from a parent for infliction of willful and malicious injuries.<sup>45</sup>

In conclusion, Justice Meyer suggested that it would have been better to justify the court's holding as a limited exception to the parent-child tort immunity doctrine: parent-child immunity should not bar suits by children against their parents where sexual abuse is alleged,<sup>46</sup> and the standard of proof in such cases should require clear, cogent, and convincing evidence.<sup>47</sup> This limitation would "weed out the truly marginal cases."<sup>48</sup>

American courts created the doctrine of parent-child immunity in a series of three cases, often referred to as the "great trilogy."<sup>49</sup> The con-

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39. *Id.* (Meyer, J., concurring in result).

40. *Id.* at 98-99, 418 S.E.2d at 516 (Meyer, J., concurring in result); see *infra* notes 63-71 and accompanying text.

41. *Holt*, 332 N.C. at 98, 418 S.E.2d at 516 (Meyer, J., concurring in result).

42. *Id.* at 98-99, 418 S.E.2d at 516 (Meyer, J., concurring in result).

43. *Id.* at 99, 418 S.E.2d at 516 (Meyer, J., concurring in result).

44. *Id.* (Meyer, J., concurring in result).

45. *Id.* (Meyer, J., concurring in result).

46. *Id.* at 98, 418 S.E.2d at 515 (Meyer, J., concurring in result). Because the legislature is in a better position to "gauge the wisdom of changing the public policy of the state," and the decision the court nevertheless felt compelled to render required a change in existing law, the court should have pronounced the most narrow holding conceivable. *Id.* (Meyer, J., concurring in result).

47. *Id.* at 100, 418 S.E.2d at 516 (Meyer, J., concurring in result).

48. *Id.* (Meyer, J., concurring in result).

49. See Edwin D. Akers & William H. Drummond, Comment, *Tort Actions Between Members of the Family—Husband & Wife—Parent & Child*, 26 MO. L. REV. 152, 182 (1961);

cept of parent-child immunity was first established in 1891 in *Hewlett v. George*.<sup>50</sup> The plaintiff sued her mother for wrongful and malicious imprisonment in an insane asylum. Justice Woods of the Mississippi Supreme Court, without citing any authority, held that an unemancipated minor was not entitled to seek civil remedies from her mother's estate for personal injuries.<sup>51</sup> He reasoned that

[t]he peace of society, and of the families composing society, and a sound public policy, designed to subserve the repose of families and the best interests of society, forbid to the minor child a right to appear in court in the assertion of a claim to civil redress for personal injuries suffered at the hands of the parent.<sup>52</sup>

Justice Woods concluded that criminal sanctions supplied the only recourse for such children.<sup>53</sup>

Twelve years later, another court followed Justice Woods' lead. The Supreme Court of Tennessee in *McKelvey v. McKelvey*<sup>54</sup> held that a child could not maintain a civil action against her father and step-mother for cruel and inhuman treatment.<sup>55</sup> The court did proffer two justifications for its holding, in addition to the *Hewlett* precedent: (1) the parents' right to discipline their child and (2) the related doctrine of inter-spousal immunity.<sup>56</sup>

In *Roller v. Roller*,<sup>57</sup> the last case in the trilogy, the Supreme Court

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Gail D. Hollister, *Parent-Child Immunity: A Doctrine in Search of Justification*, 50 FORDHAM L. REV. 489, 495 (1982); Comment, *The "Reasonable Parent" Standard: An Alternative to Parent-Child Tort Immunity*, 47 U. COLO. L. REV. 795, 796 (1976) [hereinafter "*Reasonable Parent*"]. The first reference to the "great trilogy" appeared in 1961: "The *Hewlette* [sic], *McKelvey* and *Roller* cases constitute the great trilogy upon which the American rule of parent-child tort immunity is based." Akers & Drummond, *supra*, at 182. Since "the courts recognized early that the broad general rule of immunity as originally stated would very often produce absurd or unjust results," *id.* at 217, it is unclear why these authors called these cases the "great trilogy" and not the "tragic trilogy."

50. 68 Miss. 703, 9 So. 885 (1891). The regional reporter gives the case name as *Hewlette v. George*; the spelling of the plaintiff's name in the official state reporter is used throughout this Note.

51. *Id.* at 711, 9 So. at 887.

52. *Id.* It is amazing that the justification for a doctrine of such widespread importance is rooted in this one paragraph!

53. *Id.*

54. 111 Tenn. 388, 77 S.W. 664 (1903).

55. *Id.* at 389, 77 S.W. at 664-65.

56. *Id.* at 390-92, 77 S.W. at 665. At common law, spouses could not sue each other. Hollister, *supra* note 49, at 496-97. The wife could not sue her husband because she had no individual legal identity. *Id.* ("[M]arriage fused the legal identities of husband and wife."). The husband, thus, could not sue his wife because in effect he would be suing himself. *Id.*

57. 37 Wash. 242, 79 P. 788 (1905). *Roller* is cited extensively in *Small v. Morrison*, 185 N.C. 577, 581-82, 585, 118 S.E. 12, 13-15 (1923).

of Washington introduced additional justifications for the doctrine: "[I]f a child should recover a judgment from a parent, in the event of its death the parent would become heir to the very property which had been wrested by the law from him."<sup>58</sup> Furthermore, the court noted that a rule allowing children to sue their parents for damages could jeopardize the financial welfare of other children in the family.<sup>59</sup>

In *Roller*, as in *Holt*, a father who had been convicted of raping his daughter was then sued by her in a civil action for monetary damages.<sup>60</sup> The plaintiff argued that

family relations have already been disturbed, and that, by action of the father, the minor child has, in reality, been emancipated; that the harmonious relations existing have been disturbed in so rude a manner that they can never be again adjusted; and that, therefore, the reason for the rule does not apply.<sup>61</sup>

The court's response unequivocally demonstrated that the parent-child immunity doctrine barred all tort claims, not just claims based on ordinary negligence:

[I]f it be once established that a child has a right to sue a parent for a tort, there is no practical line of demarcation which can be drawn, for the same principle which would allow the action in the case of a heinous crime, like the one involved in this case, would allow an action to be brought for any other tort. The principle permitting the action would be the same. The torts would be different only in degree.<sup>62</sup>

The first case in North Carolina to adopt the parent-child immunity doctrine was *Small v. Morrison*.<sup>63</sup> In *Small*, the daughter initiated a civil suit to recover damages from her father for injuries she sustained in a collision while a passenger in a car he was driving. The plaintiff alleged that the negligence of each or both of the drivers of the cars involved in the collision caused plaintiff's injuries.<sup>64</sup> The Supreme Court of North Carolina held that the plaintiff had no right to sue her father in tort.<sup>65</sup> The court cited the "great trilogy" to support its holding, noting that "[i]t is well established that a minor child cannot sue his parent for a

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58. *Roller*, 37 Wash. at 245, 79 P. at 789.

59. *Id.*

60. *Id.* at 243, 79 P. at 788.

61. *Id.* at 244, 79 P. at 788.

62. *Id.* at 244, 79 P. at 789.

63. 185 N.C. 577, 118 S.E. 12 (1923).

64. *Id.* at 578, 118 S.E. at 12.

65. *Id.* at 579, 118 S.E. at 12-13.



tort. . . . And this rule has been applied . . . to the most extreme case possible, that of the ravishment of a minor daughter by her father.'"<sup>66</sup>

No authority at common law justified the holding of the court in *Small*.<sup>67</sup> Furthermore, no statute in North Carolina governed the issue.<sup>68</sup> The court insisted at the end of its opinion that the judgment promoted a "sound public policy."<sup>69</sup> Defending its decision, the court stated that the doctrine "was unmistakably and indelibly carved upon the tablets of Mount Sinai."<sup>70</sup> The court never doubted that it was within its rights to adopt this immunity, even though public policy was involved.<sup>71</sup>

A review of the cases following the court's decision in *Small* reveals the manner in which the court applied the law of parent-child immunity in practice. In *Wright v. Wright*<sup>72</sup> the defendant-employer sought to extend the protections of the doctrine by alleging that it barred a suit between a child and his father's employer.<sup>73</sup> Plaintiff, a passenger in his father's taxicab, was injured because of his father's negligence.<sup>74</sup> The child sued the owner of the taxicab service.<sup>75</sup> The North Carolina Supreme Court allowed recovery: "The personal immunity from suit because of the domestic relation does not extend to the employer so as to cancel his liability or defeat recovery on the principle respondeat superior when the injury was inflicted by the servant acting as such."<sup>76</sup> The court

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66. *Id.* at 579-80, 118 S.E. at 13 (quoting 20 RULING CASE LAW § 36, at 631 (William M. McKinney et al. eds., 1929) (citation omitted)).

67. The reasons the court in *Small* did not allow the action include the lack of authority at common law that would have supported a damage recovery. *Id.* at 586, 118 S.E. at 16. However, other writers have suggested that common law did not disallow the action either. See, e.g., W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 122, at 904 (5th ed. 1984) ("[T]here is no good reason to think that the English law would not permit actions for personal torts."); "Reasonable Parent," *supra* note 49, at 796 n.4 ("There appear to be no early English cases which consider parental immunity. The early American and English commentators are in conflict as to whether the parent should be liable for torts inflicted upon his child.").

68. *Small*, 185 N.C. at 586, 118 S.E. at 16.

69. *Id.*

70. *Id.*

71. However, Justice Clark strenuously dissented from the majority's adoption of the doctrine of parent-child immunity. *Id.* at 588-604, 118 S.E. at 17-25 (Clark, J., dissenting). He asserted that the legislature was the appropriate body to enact such a law because the doctrine was based on public policy and not common law. *Id.* at 598, 602, 118 S.E. at 22, 24 (Clark, J., dissenting). "The courts should not create law to exclude [children] from justice when there has been a legal wrong." *Id.* at 602, 118 S.E. at 25 (Clark, J., dissenting).

72. 229 N.C. 503, 50 S.E.2d 540 (1948).

73. *Id.* at 507, 50 S.E.2d at 543.

74. *Id.* at 504, 50 S.E.2d at 541. "The child was not a paid passenger. The complaint describes him as an invitee, with the knowledge and consent of the defendant owner." *Id.*

75. *Id.*

76. *Id.* at 507-08, 50 S.E.2d at 544.

noted that its decision not to expand the doctrine as it had been adopted conformed to the "better reasoned view" and "sound public policy."<sup>77</sup>

In *Redding v. Redding*,<sup>78</sup> a case factually analogous to *Small v. Morrison*, the plaintiff asked the court to modify or abolish the doctrine of parent-child immunity.<sup>79</sup> The plaintiff-son alleged that the defendant-father's negligence caused an automobile accident that resulted in personal injuries to the plaintiff.<sup>80</sup> Although the court adhered to its decision in *Small* and barred plaintiff's suit, the court acknowledged that other jurisdictions had begun to reevaluate the doctrine.<sup>81</sup> The court recognized that some jurisdictions had limited the doctrine of parent-child immunity by creating an exception for willful or malicious torts.<sup>82</sup>

The *Redding* court did not adopt such a limitation, however, and several cases that followed extended the reach of the doctrine. For instance, the North Carolina Supreme Court held in *Lewis v. Farm Bureau Mutual Automobile Insurance Co.*<sup>83</sup> that the estate of an unemancipated child could not maintain an action against his mother for wrongful death caused by her ordinary negligence. The court reasoned that, if the child had lived, the doctrine of parent-child immunity would have barred a civil action for damages.<sup>84</sup> Later, in *Gillikin v. Burbage*,<sup>85</sup> the North Carolina Supreme Court recognized, in an expansive application of the rule adopted in *Small*, that parent-child immunity is reciprocal—children cannot sue their parents and parents cannot sue their children.<sup>86</sup> The court also broadly delineated the public policies embodied in the doctrine: "family unity, domestic serenity, and parental discipline."<sup>87</sup> This trend of expanding the doctrine continued in *Watson v. Nichols*.<sup>88</sup> In *Watson*, the persons the child sued were not allowed to file a cross-action against the child's parents for primary and ordinary negligence or contribution, since the effect of allowing such an action would be to make the parents indirectly liable to the child, which is not allowed under the

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77. *Id.* at 509, 50 S.E.2d at 544.

78. 235 N.C. 638, 70 S.E.2d 676 (1952).

79. *Id.* at 639, 70 S.E.2d at 677.

80. *Id.* at 638-39, 70 S.E.2d at 676.

81. *Id.* at 639-40, 70 S.E.2d at 677.

82. *Id.* at 640, 70 S.E.2d at 677.

83. 243 N.C. 55, 89 S.E.2d 788 (1955).

84. *Id.* at 56-57, 89 S.E.2d at 789.

85. 263 N.C. 317, 139 S.E.2d 753 (1965).

86. *Id.* at 321, 139 S.E.2d at 757. Plaintiff, the mother of the defendant, brought a civil action for personal injuries sustained when "she was struck by the door of defendant's automobile." *Id.* at 318, 139 S.E.2d at 755.

87. *Id.* at 321, 139 S.E.2d at 757.

88. 270 N.C. 733, 155 S.E.2d 154 (1967).

doctrine of parent-child immunity.<sup>89</sup>

In 1972, the Supreme Court of North Carolina again considered abolishing the doctrine.<sup>90</sup> In *Skinner v. Whitley*,<sup>91</sup> the court reexamined the doctrine,<sup>92</sup> reevaluated the validity of the public policies behind it,<sup>93</sup> and took notice of the status of the doctrine in other jurisdictions.<sup>94</sup> In this case, the plaintiff administrator of a deceased child's estate sought to sue the deceased parent's estate for wrongful death caused by the negligence of the parent while driving a motor vehicle.<sup>95</sup> Although the court refused to recognize this exception to the doctrine of parent-child immunity, it did note that "a growing minority of states have reexamined and modified the doctrine. Such modifications are expressed as exceptions to the immunity rule."<sup>96</sup> The *Skinner* Court recognized that one exception had previously been adopted in North Carolina: Where a parent, acting in his capacity as an employee, injures his child, the child may assert a claim against the employer.<sup>97</sup>

Declining to limit or abolish the doctrine of parent-child immunity, the *Skinner* court made several statements about the propriety of judicial assessment of public policy.<sup>98</sup> These observations have since limited the court's application of the doctrine of parent-child immunity in North Carolina. Initially, the court stated that

total abrogation of the immunity rule would lead to judicial supervision over the conduct of parent and child in the ordi-

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89. *Id.* at 735, 155 S.E.2d at 156. In *Watson*, the plaintiff-child sued the parents of another child for their negligence in allowing their son to operate a power lawnmower. *Id.* at 735, 155 S.E.2d at 155. Plaintiff suffered injuries when the defendants' son backed the power lawnmower over plaintiff's foot. *Id.*

90. See *supra* note 79 and accompanying text.

91. 281 N.C. 476, 189 S.E.2d 230 (1972).

92. *Id.* at 479-80, 189 S.E.2d at 232.

93. *Id.* at 480, 189 S.E.2d at 232-33. The court listed five policy reasons for the doctrine: (1) domestic serenity, (2) danger of fraud and collusion among parents and children to obtain insurance proceeds, (3) depletion of family funds, (4) "the possibility of inheritance, by the parent, of the amount recovered in damages by the child," and (5) parents' rights to control and discipline their children. *Id.*

94. *Id.* at 480, 189 S.E.2d at 233.

95. *Id.* at 476-77, 189 S.E.2d at 231; see *supra* notes 83-84 and accompanying text.

96. *Skinner*, 281 N.C. at 481, 189 S.E.2d at 233. The court noted several exceptions. Suits are allowed where death terminates the parent-child relationship, where there is outrageous conduct on the part of the parent that invades the child's rights, or where there is willful and intentional injury of the child. *Id.* Furthermore, "[w]here a dual relationship exist[ed] between parent and child, such as master and servant or carrier and passenger, the domestic relationship has been described as merely incidental, affording no immunity." *Id.* Finally, where the parent was acting in the scope of his employment, the doctrine would not bar a suit by the child against the employer. *Id.*

97. *Id.* at 481-82, 189 S.E.2d at 233; see *supra* notes 72-77 and accompanying text.

98. *Skinner*, 281 N.C. at 484, 189 S.E.2d at 235.

nary operation of the household. This should never be done so long as the law imposes on the parents the duty and obligation to support, control and discipline their children.<sup>99</sup>

Declaring that "piecemeal abrogation" by the judiciary was imprudent, the court then noted that in any event it still believed that the public policy considerations discussed in *Small v. Morrison* outweighed arguments for change in cases involving ordinary negligence.<sup>100</sup> The court next explained that changes in the established law should be effectuated by the General Assembly because the easiest way to change a law is by statute and "'question[s] of public policy [are] to be determined by the legislature and not by the court.'" <sup>101</sup> The court did, however, reserve the right in dicta to refuse to apply the doctrine in any future case involving an "intentional, willful or malicious tort inflicted on a child."<sup>102</sup>

In 1975, the General Assembly partially responded to the court's plea by passing North Carolina General Statutes Section 1-539.21, which allows a child to sue his parent in tort "for personal injury or property damage arising out of the operation of a motor vehicle owned or operated by such parent."<sup>103</sup> In *Ledwell v. Berry*,<sup>104</sup> this statute survived an equal protection challenge that arose because the statute abolished the parent's immunity but not the child's.<sup>105</sup>

In *Snow v. Nixon*,<sup>106</sup> the North Carolina Court of Appeals addressed the scope of the motor vehicle exception created by the statute. In this

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99. *Id.*

100. *Id.*

101. *Id.* (quoting 3 ROBERT E. LEE, NORTH CAROLINA FAMILY LAW § 248, at 179 (3d ed. 1963)).

102. *Id.*

103. N.C. GEN. STAT. § 1-539.21 (1983).

104. 39 N.C. App. 224, 249 S.E.2d 862 (1978), *disc. rev. denied*, 296 N.C. 585, 254 S.E.2d 35 (1979). In *Ledwell*, the mother sought a declaratory judgment that the statute was unconstitutional. *Id.* at 224, 249 S.E.2d at 863. In a separate action, the minor defendant filed an action against his mother for personal injuries he sustained as a result of her negligent operation of a motor vehicle. *Id.* In that action, the mother was barred from pleading the doctrine of parent-child immunity because of § 1-539.21. *Id.*

105. *Id.* at 225-26, 249 S.E.2d at 863-64. The court held that the law had "a reasonable relation to the accomplishment of the legislative purpose," *id.* at 225, 249 S.E.2d at 863, and was based upon a "reasonable distinction" that "[p]arents have the right and duty to train and control unemancipated minor children." *Id.* at 226, 249 S.E.2d at 864. Furthermore, in dicta, the court noted that the removal of an immunity by the legislature is within the state's police powers. *Id.* Subsequently, in *Allen v. Allen*, 76 N.C. App. 504, 333 S.E.2d 530, *disc. rev. denied*, 315 N.C. 182, 337 S.E.2d 855 (1985), the court of appeals held that the statute did not violate a parent's right to substantive due process because it did not deprive her of a right to which she was otherwise entitled. *Id.* at 506, 333 S.E.2d at 532. The court reasoned that prior to the enactment of the statute, the mother did not have a right to maintain a suit against her child because of the doctrine of parent-child immunity. *Id.*

106. 52 N.C. App. 131, 277 S.E.2d 850 (1981).

case, the child suffered injuries when she darted in front of the defendant's car, after alighting from the vehicle driven by her mother. The daughter sued the driver of the other car, who in turn initiated a third-party complaint for contribution from the plaintiff's mother.<sup>107</sup> The court of appeals held that the statute applied so that the doctrine of parent-child immunity did not bar the defendant's claim against the mother.<sup>108</sup> Not only did the court announce an expansive holding, but its reasoning evinced a very liberal interpretation of the statute. The court stated that the statute applied to the facts in this case because the injuries sustained by the daughter arose out of the mother's operation of a motor vehicle.<sup>109</sup>

The North Carolina Supreme Court further enlarged the scope of the statute in *Carver v. Carver*,<sup>110</sup> which involved a suit for wrongful death by the estate of a deceased two-month old child against his mother.<sup>111</sup> The child died in a car accident caused by his mother's negligence.<sup>112</sup> The supreme court held that, because the exception to parent-child immunity created by the statute would not have barred a personal injury action brought by the child had he lived, "it likewise does not bar this wrongful death action brought by his estate."<sup>113</sup>

In *Coffey v. Coffey*,<sup>114</sup> a mother filed a complaint against her son, "alleging that she sustained injuries as a result of [his] negligent operation of an automobile . . . in which [she] was a passenger."<sup>115</sup> The North Carolina Court of Appeals considered whether the statute abolished a child's immunity,<sup>116</sup> and decided it did not.<sup>117</sup> Eleven days after this decision, the General Assembly amended the statute<sup>118</sup> to abolish a

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107. *Id.* at 131-32, 277 S.E.2d at 850.

108. *Id.* at 135, 277 S.E.2d at 853.

109. *Id.* at 134-35, 277 S.E.2d at 852.

110. 310 N.C. 669, 314 S.E.2d 739 (1984).

111. *Id.* at 671, 314 S.E.2d at 740-41.

112. *Id.*

113. *Id.* at 673, 314 S.E.2d at 742. The court relied in part on N.C. GEN. STAT. § 28A-18-2 (1984 & Supp. 1991), which authorizes wrongful death actions when the injured person, had he lived, would have been entitled to sue for damages. *Carver*, 310 N.C. at 674, 314 S.E.2d at 741-42. Justice Meyer, who dissented in *Carver*, stated that the statute should "not be extended by judicial fiat to wrongful death actions. If the legislature chooses to do so, it may express its intent and will to so extend the statute by appropriate legislation." *Id.* at 686, 314 S.E.2d at 749 (Meyer, J., dissenting).

114. 94 N.C. App. 717, 381 S.E.2d 467 (1989), *disc. rev. improvidently allowed*, 326 N.C. 586, 391 S.E.2d 40 (1990) (*per curiam*).

115. *Id.* at 718, 381 S.E.2d at 468.

116. *Id.*

117. *Id.* at 719, 381 S.E.2d at 469.

118. Harlin R. Dean, Jr., Note, *It's Time to Abolish North Carolina's Parent-Child Immu-*

child's immunity in motor vehicle cases and to allow recovery for wrongful death.<sup>119</sup> Obviously, this amendment broadened the initial exception created by the legislature. Although the legislature created an exception to the parent-child immunity doctrine as it pertained to motor vehicle cases, it did not modify or abrogate the doctrine in any other respects.<sup>120</sup>

In *Lee v. Mowett Sales Co.*,<sup>121</sup> the North Carolina Supreme Court again considered abolishment of the doctrine.<sup>122</sup> In *Lee*, a lawn mower driven by the child's father came into contact with her foot, injuring the child.<sup>123</sup> She sued the manufacturer of the lawnmower, who sought contribution from her father, claiming he was negligent.<sup>124</sup> The court did not allow the third party plaintiff's action.<sup>125</sup>

In reviewing the application of the doctrine over the years, the court stated, "The *Small* decision enunciated the rule that an unemancipated minor child may not maintain an action based on ordinary negligence against his parents."<sup>126</sup> In dicta, the court stated that the doctrine did not bar actions for willful and malicious acts.<sup>127</sup> The court nevertheless refused to abolish the doctrine because

[t]o judicially abolish the parent-child immunity doctrine after the legislature has considered and retained the doctrine would be to engage in impermissible judicial legislation. If the doctrine is to be abolished at this late date, it should be done by legislation and not by the Court. . . . The doctrine will continue to be applied as it now exists in North Carolina until it is abolished or amended by the legislature.<sup>128</sup>

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ity, *But Who's Going to Do It?* — Coffey v. Coffey and North Carolina General Statutes Section 1-539.21, 68 N.C. L. REV. 1317, 1318 (1990).

119. N.C. GEN. STAT. § 1-539.21 (Supp. 1992) provides, "The relationship of parent and child shall not bar the right of action by a person or his estate against his parent or child for wrongful death, personal injury, or property damage arising out of operation of a motor vehicle owned or operated by the parent or child." *Id.*

120. See *Lee v. Mowett Sales Co.*, 316 N.C. 489, 494-95, 342 S.E.2d 882, 885 (1986) (recognizing the limited extent of legislative modification of the doctrine).

121. 316 N.C. 489, 342 S.E.2d 882 (1986).

122. *Id.* at 489-91, 342 S.E.2d at 882-83.

123. *Id.* at 490, 342 S.E.2d at 883.

124. *Id.* at 489, 342 S.E.2d at 883.

125. *Id.* at 490, 342 S.E.2d at 883.

126. *Id.* at 491, 342 S.E.2d at 884. The court, however, cited for this proposition *Redding v. Redding*, 235 N.C. 638, 70 S.E.2d 676 (1952), in which the court noted that other jurisdictions had created exceptions to the doctrine of parent-child immunity for willful and malicious actions. See *supra* notes 78-82 and accompanying text.

127. *Lee*, 316 N.C. at 492, 342 S.E.2d at 884 (citing 3 ROBERT E. LEE, NORTH CAROLINA FAMILY LAW § 248, at 297 (4th ed. 1981)).

128. *Id.* at 494-95, 342 S.E.2d at 885-86. Justices Exum and Martin each dissented separately. See *id.* at 496-97, 342 S.E.2d at 886 (Exum, J., dissenting); *id.* at 495-96, 342 S.E.2d at

This directive heavily impacted the North Carolina Supreme Court's ruling in *Holt*. The court's options were restricted because (1) the court was precluded from making an exception to the doctrine of parent-child immunity and from abolishing the doctrine because the court had stated in earlier cases that either action would be "impermissible judicial legislation,"<sup>129</sup> and (2) equitable concerns precluded the court from recognizing that the doctrine as adopted in *Small v. Morrison* barred all tort actions because then the action in the instant case would not be allowable. Limited in these respects, the court adhered to dicta in *Lee v. Mowett Sales Co.* supporting the notion that *Small v. Morrison* applied only to bar suits involving ordinary negligence.<sup>130</sup> The court concluded that the father's acts of rape and sexual molestation were willful and malicious, thus exceeding the ordinary negligence immunity standard.<sup>131</sup> What will be the effect of the court's holding? Does it matter that the court did not simply create an express exception for willful and malicious acts?<sup>132</sup>

The majority's holding, which was more expansive than an exception could have been, concerned Justice Meyer.<sup>133</sup> His concerns provide a useful roadmap for analyzing how courts should interpret and apply the holding of *Holt*.<sup>134</sup> Is it limited to cases of sexual abuse? Should the standard of proof required in such cases be raised to clear, cogent, and convincing evidence? In light of the majority's statement on reasonable chastisement, where should the line be drawn between discipline and willful and malicious acts of physical abuse? Would the majority simi-

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886-87 (Martin, J., dissenting). "Where this Court has established a precedent, as in *Small v. Morrison*, which deprives a recognized segment of society of its just rights, it should not hesitate to remedy its own wrongs. Such is not judicial legislation, but judicial enlightenment." *Id.* at 496, 342 S.E.2d at 887 (Martin, J., dissenting).

129. See *supra* note 128 and accompanying text.

130. See *supra* note 126 and accompanying text.

131. See *supra* note 29 and accompanying text.

132. The daughter's lawyer noted that the supreme court's holding goes farther than the court of appeals:

The difference is that the Appeals Court said under the facts of this case there is a cause of action . . . . The Supreme Court said children may sue in all cases of willful and malicious conduct. That's a big difference. For example, if a child receives a severe whipping that is injurious, that may be grounds for relief.

*Parental Immunity Is Limited*, N.C. LAW. WKLY., July 27, 1992, at 1, 3. This illustrates just how expansively the court's holding may be read.

133. *Holt*, 332 N.C. at 100, 418 S.E.2d at 516 (Meyer, J., concurring in result). There is a fine distinction between creating an exception to an established body of case law and construing precedent in a manner that reaches the same result. The distinction involves a difference in methodology, since in both cases the court runs the risk of upsetting expectations. An exception, however, may be more clearly defined, thus promoting stability in the law.

134. See *supra* notes 34-49 and accompanying text.

larly apply the law on facts alleging only gross negligence since this too would exceed the protected arena of ordinary negligence?

After *Holt*, only two things are clear: (1) Acts of ordinary negligence are still protected by the parent-child immunity doctrine, and (2) in suits involving sexual abuse, the court will allow recovery because these acts, unlike acts of ordinary negligence, are willful and malicious. Instead of muddying the waters of parent-child immunity, *Holt* could have been a watershed case either abolishing the doctrine or creating a clearly enunciated exception to the doctrine's general rule of immunity. Why was it neither?

The court's earlier statements regarding the propriety of judicial legislation, interpreted as being either modification or abolition of the doctrine, restricted the court's reasoning. The court's fears of judicial legislation may have resulted from the stigma associated with "lochnerizing." This term is a byword that applies when "judges substitute their policy preferences for those of the legislature."<sup>135</sup> In *Holt*, Justice Mitchell, writing for the majority, expressly stated that this was his concern: "[T]o judicially abolish the parent-child immunity after the legislature has considered and retained the doctrine would be to engage in impermissible judicial legislation."<sup>136</sup>

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135. WILLIAM M. WIECEK, *LIBERTY UNDER LAW: THE SUPREME COURT IN AMERICAN LIFE* 124-25 (1988). The term "lochnerizing" is derived from *Lochner v. New York*, 198 U.S. 45 (1905), in which the United States Supreme Court struck down a state law that limited the number of hours men could work per week. WIECEK, *supra*, at 124.

Put simply, the problem is: how can an institution that is not at all democratic in its composition and methods legitimately exercise the power of holding void the laws enacted by the democratically elected branch of government, the people's representatives? This question of legitimacy has provoked another: can Supreme Court adjudication be objective? . . . [C]an its decision be defended by reference to criteria of judgment external to the judges' personal political, social, economic, religious, and ideological preferences? Or is appellate judging really nothing more, in the end, than the judges substituting their own views about desirable social policy for those of the people's representatives?

*Id.* at 1.

136. *Holt*, 332 N.C. at 93, 418 S.E.2d at 513 (quoting *Lee v. Mowett Sales Co.*, 316 N.C. 489, 494, 342 S.E.2d 882, 883 (1986)). In *Lee*, the North Carolina Supreme Court noted that after its *Watson* and *Skinner* decisions, the legislature "carved out *only a single exception* involving a child's personal injuries resulting from a parent's operation of a motor vehicle. . . . [T]he legislature otherwise left the parent-child immunity doctrine intact . . ." *Lee*, 316 N.C. at 494, 342 S.E.2d at 885. The supreme court assumed that the legislature reviewed the entire doctrine and decided to retain it, except for the motor vehicle exception. *Id.* The court made this assumption because it thought it would be unreasonable for the legislature to leave such an important matter "open to speculation." *Id.* at 494-95, 342 S.E.2d at 886. It seems equally as probable, however, that the legislature only considered this one exception to the doctrine. "The legislative action may have resulted in part from a recognition of the compulsory nature of modern automobile liability insurance statutes." *Id.* at 493, 342 S.E.2d at 885. Even if the



Initially, it must be realized that the legitimacy of judicial review is being reestablished.<sup>137</sup> As long as the justices are not merely imposing their will over that of the legislature, the court can avoid the stigma of "lochnerizing."<sup>138</sup> Five factors should guide a court's exercise of judicial review: the text of the federal and state constitutions and applicable statutes, the legislative history, the structure of and relationship between branches of government as created by the constitution, judicial precedent, and "the basic values that underlie our society."<sup>139</sup> These factors provide internal restraints on judicial review.<sup>140</sup>

Furthermore, the North Carolina Supreme Court previously has stated:

The Courts of this State have no inherent power to review acts of the General Assembly and to declare invalid those which the Courts disapprove of or, upon their own initiative, find to be in conflict with the Constitution. The Courts and the Legislature are coordinate branches of the State government and neither is superior to the other.<sup>141</sup>

But in *Holt*, the court was not asked to assess the constitutionality or the propriety of a statute.<sup>142</sup>

The legislature has acted only twice to further the development of the judicial doctrine of parent-child immunity in North Carolina: the passage and amendment of North Carolina General Statutes Section 1-539.21.<sup>143</sup> Neither act of the General Assembly was at issue in *Holt*, and the appellate courts of North Carolina previously had upheld the constitutionality of this statute.<sup>144</sup> Because there is no evidence that the General Assembly considered altering the doctrine in any respect other than that addressed by Section 1-539.21 of the North Carolina General Statutes, or that it considered complete abrogation, the court should not be precluded from evaluating the merits of alteration or abolition of the doc-

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legislature had considered the entire doctrine and decided to retain it, the court did not have to defer to this inaction. See *infra* notes 145-46 and accompanying text.

137. See generally WIECEK, *supra* note 135, at 188 (stating that the agenda for modern debate is "[h]ow to legitimate judicial review and set the proper bounds for its scope").

138. *Id.* at 191.

139. *Id.* at 185-87. Here, the five criteria for judgment that Wiecek suggests should guide justices in their review of a statute, as they have been couched in terms that should make them useful to state court judges.

140. *Id.* at 185.

141. *Green v. Eure*, 27 N.C. App. 605, 608, 220 S.E.2d 102, 104 (1975).

142. Rather the plaintiffs only asked the court to allow them to maintain a suit against their father for assault and battery and intentional infliction of emotional distress. See *supra* note 18 and accompanying text.

143. See *supra* notes 103-20 and accompanying text.

144. See *supra* note 105 and accompanying text.

trine.<sup>145</sup> "North Carolina courts have altered judicially-created common-law rules with public policy ramifications on numerous occasions. Thus, the supreme court's deference to the General Assembly on the issue of parental immunity is not mandated by judicial precedent."<sup>146</sup>

In summary, if the court is assessing the constitutionality of a *statute*, the statute should be presumed valid<sup>147</sup> and five factors—text, legislative history, structure of government, judicial precedent, and societal values—should then guide the court's assessment.<sup>148</sup> If the court is assessing the propriety or constitutionality of a doctrine previously adopted by the *courts*, however, even if the legislature has reviewed the doctrine and decided not to act on the matter, then the court may amend or abolish the doctrine without deferring to the legislature's inaction.<sup>149</sup>

The Supreme Court of North Carolina has been forced to engage in a stealthy mission of judicial legislation to ensure justice because of (1) the General Assembly's inaction in stating its view on the appropriate role of the doctrine of parent-child immunity in North Carolina, (2) the judiciary's assumption that the legislature's single exception to the doctrine for motor vehicle cases could be interpreted as a retention of the doctrine generally, and (3) the judiciary's assumption that any future judicial modification of the doctrine would constitute "impermissible judicial legislation." The court's decision in *Holt* is an example of such

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145. At least one court has completely rejected the policy of not overruling past decisions where the legislature had acted in the matter. See *Holytz v. City of Milwaukee*, 17 Wis. 2d 26, 36-39, 115 N.W.2d 618, 623-25 (1962). The court in *Goller v. White*, 20 Wis. 2d 402, 122 N.W.2d 193 (1963), held "that it was our responsibility to change a court-made rule of law when we deemed the change necessary in the interests of justice even though the legislature had refused to make the change." *Id.* at 412, 122 N.W.2d at 198 (paraphrasing the holding in *Holytz*). In *Goller*, the Wisconsin Supreme Court abolished the parent-child immunity doctrine, except in two situations, even though the Wisconsin legislature had rejected a bill that would also have abolished the immunity. *Id.*; see *infra* notes 170-73 and accompanying text. The New Jersey Supreme Court approached this problem in a slightly different fashion. It reasoned that it was free to amend or abolish immunity doctrines anywhere a legislative statute had not positively granted the immunity. *Foldi v. Jeffries*, 93 N.J. 533, 544-45, 461 A.2d 1145, 1151 (1983). Thus, since there was not a legislative mandate guaranteeing parental immunity, the New Jersey Supreme Court decided that it was free to weigh the competing policy issues and abrogate or abolish the doctrine as it deemed appropriate. *Id.*

146. Beth A. Falk, Note, *Lee v. Mowett Sales Co.: North Carolina Retains Its Partial Parent-Child Immunity Doctrine*, 65 N.C. L. REV. 1457, 1472-73 (1987) (footnote omitted).

147. See *Martin v. Housing Corp.*, 277 N.C. 29, 41, 175 S.E.2d 665, 671 (1970) ("When the constitutionality of a statute is challenged, 'every presumption is to be indulged in favor of its validity.'" (quoting *State v. Lueders*, 214 N.C. 558, 561, 200 S.E. 22, 24 (1938))).

148. See *supra* notes 139-40 and accompanying text.

149. Since the legislature functions as the final decision maker regarding public policy in a state, this type of decision could be overruled by a subsequently enacted statute. See *Allen v. Allen*, 76 N.C. App. 504, 507, 333 S.E.2d 530, 533, *disc. rev. denied*, 315 N.C. 182, 337 S.E.2d 855 (1985) (stating that issues of public policy are for the legislature to decide).

stealth. Because of the effect of the court's treatment of precedent in *Holt*, the case easily can be interpreted as an act of judicial legislation, though the court neither expressly created an exception to the doctrine of parent-child immunity nor abolished the doctrine.

The Supreme Court of North Carolina in *Small v. Morrison* held that a child did not have a right to sue her father in tort.<sup>150</sup> *Small* relied in part on *Roller v. Roller*, a case that did not allow a daughter to recover damages from her father who had raped her.<sup>151</sup> Two factors suggest that the *Small* court did not intend its holding to be limited to actions of ordinary negligence: (1) the court's reliance on *Roller*, and (2) the court's inclusion of a quote stating that the doctrine of parent-child immunity barred even "the most extreme case possible, that of the ravishment of a minor daughter by her father."<sup>152</sup> Since *Small* distinguished neither *Roller* nor the quote, it is likely that the court intended the doctrine of parent-child immunity to bar actions for intentional torts as well as for those negligently inflicted. Seemingly, a court would not cite sources, without distinguishing them, unless it intended to adopt the propositions asserted by the sources.

Subsequent court opinions and comments by many writers support Justice Meyer's assertion in *Holt* that "[s]ince the doctrine's inception, the bench and the bar of the state have understood the doctrine of parent-child immunity to apply to all actions for personal injuries, however they were caused."<sup>153</sup> For instance, in 1948, the North Carolina Supreme Court in *Wright v. Wright* assessed whether the doctrine of parent-child immunity would bar claims by a child against his father's employer.<sup>154</sup> The court relied on *Small* for the law on parent-child immunity: "Chief Justice Stacy, writing the opinion for the Court, laid down the rule that an unemancipated minor child living as a member of the family may not maintain an action against the father for tort (including negligent injury)."<sup>155</sup> The explicit inclusion of negligent torts in such

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150. 185 N.C. 577, 579, 118 S.E. 12, 12-13 (1923). See *supra* notes 63-71 and accompanying text.

151. 37 Wash. 242, 79 P. 788 (1905); see *supra* notes 57-62 and accompanying text.

152. See *supra* note 66 and accompanying text.

153. *Holt*, 332 N.C. at 98, 418 S.E.2d at 515 (Meyer, J., concurring in result). This is in contradistinction to the holding of the majority of the court in *Holt*: "[S]ince our decision in *Small*, this Court has consistently applied the rule enunciated in that case; 'an unemancipated minor child may not maintain an action based on ordinary negligence against his parents.'" *Id.* at 93, 418 S.E.2d at 512 (quoting *Lee v. Mowett Sales Co.*, 316 N.C. 489, 491, 342 S.E.2d 882, 884 (1986)).

154. 229 N.C. 503, 507, 50 S.E.2d 540, 543 (1948); see *supra* notes 72-77 and accompanying text.

155. *Wright*, 299 N.C. at 507, 50 S.E.2d at 543.

a manner clearly indicates that the doctrine covers negligence *in addition to* intentional torts.

Furthermore, in 1966, a commentator stated: "Parent-child suits . . . are not permitted when the action is based on a personal injury, whether such injury was caused by negligence or by a willful or malicious act."<sup>156</sup> The *North Carolina Family Law Practice Handbook* states that statutory and judicial exceptions to the doctrine were very limited and "parents may still be immune from suit by a child for intentional torts like assault, battery, false imprisonment and the like even when the tortious behavior involves elements of moral turpitude."<sup>157</sup> Moreover, although North Carolina courts often cite Professor Robert Lee's *North Carolina Family Law* for the proposition that the parent-child immunity doctrine does not bar personal injury suits based on willful and malicious acts, Lee acknowledges that this conclusion derives solely from inferences in opinions that indicate recovery might be allowed if the act was willful and malicious.<sup>158</sup> In a discussion about the possibility of North Carolina courts adopting an exception for willful and malicious acts—which had been done for the first time in 1950 by the Supreme Court of Oregon<sup>159</sup>—a North Carolina writer stated: "The North Carolina Supreme Court adopted the general rule of nonliability in *Small v. Morrison*."<sup>160</sup> It is illustrative to note, finally, that the majority in *Holt* resorted to citing a 1986 case, *Lee v. Mowett Sales Co.*, for its version of the doctrine that it purported was enunciated in *Small*.

The majority's inquiry into the willful and malicious nature of the father's acts in *Holt* lends credence to Justice Meyer's assertion that, by its decision, the majority created an exception to the doctrine of parent-child tort immunity for willful and malicious acts—otherwise, the majority simply could have held that since this was not ordinary negligence, the doctrine did not apply.<sup>161</sup> A narrow holding crafting an exception to the doctrine of parent-child immunity in cases of sexual abuse would have limited the court's ruling, allaying any fear of subsequent suits against parents for reasonable chastisement.<sup>162</sup> Furthermore, since an objective survey of judicial precedent supports Justice Meyer's assertion

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156. Thomas J. Bolch, *Torts—Parent-Child Immunity*, 44 N.C. L. REV. 1169, 1171-72 (1966). Bolch noted that in a number of opinions the court expressed a desire to join a nationwide trend of allowing such actions. *Id.* at 1172 n.15.

157. THE NORTH CAROLINA FAMILY LAW PRACTICE HANDBOOK 456 (1984).

158. 3 ROBERT E. LEE, NORTH CAROLINA FAMILY LAW § 248, at 299 (4th ed. 1981).

159. *Cowgill v. Boock*, 189 Or. 282, 301, 218 P.2d 445, 453 (1950).

160. Earl W. Vaughn, *Torts—Liability of Parent for Willful Injury to Child*, 29 N.C. L. REV. 214, 216 (1951).

161. *Holt*, 332 N.C. at 98, 418 S.E.2d at 516 (Meyer, J., concurring in result).

162. See *supra* note 33 and accompanying text.

that the bench and bar believed that *Small v. Morrison* barred suits involving intentional torts as well as negligence, it was improper for the supreme court to construe the *Small* decision to bar only suits involving ordinary negligence. An express exception for willful and malicious acts or acts of sexual abuse, overruling a portion of the *Small* holding, would have been a more honest approach for the judiciary to take in deciding *Holt* even though it would have involved overt judicial legislation.<sup>163</sup>

The court clearly has requested that the legislature assess the public policies supporting the doctrine and modify or abolish the immunity as it deems appropriate.<sup>164</sup> Moreover, there are arguments that the legislature is indeed the more appropriate body to make this determination: "A declaration of public policy in this area should preferably be made by the General Assembly. . . . [Legislation can] defin[e] the areas to be affected within appropriate limitations, and not piecemeal by this court in the peculiar circumstances of a given case."<sup>165</sup> It seems logical that the role of the legislature should be to make the laws of the state since it is a representative body.<sup>166</sup> Finally, it has also been suggested that enacting a statute is a simpler way to change a body of law.<sup>167</sup> This Note urges the General Assembly to use its authority either to abolish the doctrine of parent-child immunity or, at a minimum, to make a plain statement of its intent to retain the doctrine, thus clarifying the effect of *Holt*.<sup>168</sup> Three

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163. The court could have avoided the stigma it associates with what it terms "impermissible judicial legislation." See *supra* note 31 and accompanying text. Modification or abolition of the doctrine, contributing to its overall decline throughout this country, "illustrates very well the orthodox process of judicial legislation by exception, elaboration and interpretation." Akers & Drummond, *supra* note 49, at 217. Furthermore, "the courts in this State have the authority and obligation to modify or abolish inequitable and outdated judicial doctrines when the need arises . . . . [M]ost states that have abolished parental immunity have done so by court decision, not by statute." Lee v. Mowett Sales Co., 76 N.C. App. 556, 559-60, 564-65, 334 S.E.2d 250, 252-53, 255 (1985) (Becton, J., dissenting); see also Bolch, *supra* note 156, at 1177 ("[I]t should be remembered that the immunity was a creature of the courts, and what the courts created they can destroy.").

164. See *supra* notes 101 and 128 and accompanying text.

165. Castellucci v. Castellucci, 96 R.I. 34, 38, 188 A.2d 467, 469 (1963), cited in Skinner v. Whitley, 281 N.C. 476, 484, 189 S.E.2d 230, 235 (1972).

166. More importantly, the North Carolina Constitution gives the General Assembly the power to grant or deny immunity. Dixon v. Peters, 63 N.C. App. 592, 597, 306 S.E.2d 477, 480 (1983), cited in Allen v. Allen, 76 N.C. App. 504, 506, 333 S.E.2d 530, 532 (1985).

167. 3 LEE, *supra* note 158, § 248, at 299.

168. The United States Supreme Court observed the importance of the legislature's delivering a plain statement of its intent in Gregory v. Ashcroft, 111 S. Ct. 2395 (1991): "In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *Id.* at 2401 (quoting United States v. Bass, 404 U.S. 336, 349 (1971)). A plain statement must be "unmistakably clear in the language of the statute." *Id.* (quoting Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242

interests require balancing as the legislature reevaluates the public policies supporting the doctrine of parent-child immunity: "those of the parent in raising his child, of the child in compensation for his injuries, and of society in preserving the family structure."<sup>169</sup>

Courts and legislatures abolishing the doctrine have adopted one of three alternatives in place of parent-child immunity. First, in *Goller v. White*,<sup>170</sup> the Wisconsin Supreme Court abrogated the doctrine with two exceptions: "(1) where the alleged negligent act involves an exercise of parental authority over the child;<sup>171</sup> and (2) where the alleged negligent act involves an exercise of ordinary parental discretion with respect to the provision of food, clothing, housing, medical and dental services, and other care."<sup>172</sup> Where these exceptions do not apply, the reasonableness standard applies to the parent's actions.<sup>173</sup>

Another alternative is the reasonable parent standard: "[W]hat would an ordinarily reasonable and prudent *parent* have done in similar circumstances?"<sup>174</sup> The parent, under this standard, retains some leeway in raising the child, the child has a right to recover for unreasonable injuries, and the public policies of family harmony, fraud, and collusion, as well as the preservation of parental authority, are preserved.<sup>175</sup> Courts are familiar with applying reasonableness standards, and the court should continue to assess traditional considerations such as the child's capacity and intelligence and exceptional circumstances in determinations of reasonableness.<sup>176</sup>

Similarly, the *Restatement (Second) of Torts* urges complete abrogation of the doctrine of parent-child immunity: "A parent or child is not immune from tort liability to the other solely by reason of that relation-

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(1985)). The legislature should strive to declare its intention in "straightforward and unequivocal language." *Hatcher v. Rose*, 97 N.C. App. 652, 655, 389 S.E.2d 442, 444 (1990).

169. "Reasonable Parent," *supra* note 49, at 805.

170. 20 Wis. 2d 402, 122 N.W.2d 193 (1963).

171. This exception provides immunity in the area of parental discipline. "Reasonable Parent," *supra* note 49, at 806.

172. *Goller*, 20 Wis. 2d at 413, 122 N.W.2d at 198. The second exception provides immunity in the parent's performance of legal duties. "Reasonable Parent," *supra* note 49, at 806.

173. "Reasonable Parent," *supra* note 49, at 807. For an in-depth discussion of the pros and cons of this alternative, see Hollister, *supra* note 49, at 512-16.

174. *Gibson v. Gibson*, 3 Cal. 3d 914, 921, 479 P.2d 648, 653, 92 Cal. Rptr. 288, 293 (1971).

175. "Reasonable Parent," *supra* note 49, at 808-09.

176. *Id.* at 810. The major drawback of this approach is that it assumes courts will be sensitive enough to account for "different economic, educational, cultural, ethnic and religious backgrounds." *Holodook v. Spencer*, 36 N.Y.2d 35, 50, 324 N.E.2d 338, 346, 364 N.Y.S.2d 859, 871 (1974).

ship.”<sup>177</sup> The reasonable, prudent parent standard should be imposed by the courts, the *Restatement* posits, but only in light of the need for parental discretion, “to require that the conduct be palpably unreasonable in order to impose liability.”<sup>178</sup> The *Restatement* provides guidelines to aid courts and legislatures in determining what is reasonable.<sup>179</sup>

There is another option, however, which is ideal for North Carolina but has not yet been proposed. An inquiry most effectively demonstrates this alternative. If the doctrine were abolished by the legislature tomorrow, what would be the state of the law in North Carolina? Would existing constitutional, statutory, and case law be adequate to fill in the void? This Note asserts that parents and children in North Carolina would have adequate recourse and protection.

The United States Constitution provides some basic protections for the parent-child relationship.<sup>180</sup> Freedom of choice in the area of family life is protected by the Due Process Clause of the Fourteenth Amendment.<sup>181</sup> “It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.”<sup>182</sup> Because of the special role the family plays in our country, constitutional principles are “applied with sensitivity and flexibility to the special needs of parents and children.”<sup>183</sup>

The North Carolina Constitution provides additional protection for the child: “All courts shall be open; every person for an injury done him in his . . . person . . . shall have remedy by due course of law; and right and justice shall be administered without favor, denial, or delay.”<sup>184</sup> This provision, it has been asserted, “mandates that children should have a remedy against their negligent parents.”<sup>185</sup>

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177. RESTATEMENT (SECOND) OF TORTS § 895G(1) (1977).

178. *Id.* § 895G cmt. k.

179. *Id.*

180. *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978).

181. *Id.*; see U.S. CONST. amend XIV, § 1.

182. *Quilloin*, 434 U.S. at 255 (quoting *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944)); see *Bellotti v. Baird*, 443 U.S. 622 (1979). The *Baird* Court stated:

[D]eeply rooted in our Nation's history and tradition, is the belief that the parental role implies a substantial measure of authority over one's children. Indeed, “constitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society.”

*Id.* at 638 (quoting *Ginsberg v. New York*, 390 U.S. 629, 639 (1968)).

183. *Baird*, 443 U.S. at 634.

184. N.C. CONST. art. I, § 18.

185. *Lee v. Mowett Sales Co.*, 316 N.C. 489, 495, 342 S.E.2d 882, 887 (1986) (Martin, J., dissenting).

Additionally, in North Carolina, the body of case law that has developed regarding civil liability of teachers for injuries sustained by their students should be wholly applicable to parents, once the doctrine of parent-child immunity is abolished, since teachers stand *in loco parentis*.<sup>186</sup>

One of the most sacred duties of parents, is to train up and qualify their children, for becoming useful and virtuous members of society; this duty cannot be effectually performed without the ability to command obedience, to control stubbornness, to quicken diligence, and to reform bad habits; and to enable him to exercise this salutary sway, he is armed with the power to administer moderate correction, when he shall believe it to be just and necessary. The teacher is the substitute of the parent; is charged in part with the performance of his duties, and in the exercise of these delegated duties, is invested with his power.<sup>187</sup>

As case law developed through the early twentieth century, a test developed to gauge when a pupil could recover damages from his teacher for injuries. Recovery was allowed (1) if the injury was permanent and the teacher, "in the light of the attending circumstances and in the exercise of ordinary care, ought reasonably to have foreseen that a permanent injury would be the natural and probable consequence of his act," or (2) if the teacher was acting maliciously.<sup>188</sup> This same standard is used to assess a parent's criminal liability in North Carolina;<sup>189</sup> likewise, if the parent-child immunity doctrine were abolished, such a standard could be used to assess a parent's civil liability.<sup>190</sup> Thus, if the parent-child immunity doctrine were abolished, existing constitutional, case, and statutory law still should provide adequate safeguards protecting the parents while allowing the children to have adequate redress for their injuries.<sup>191</sup>

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186. *In loco parentis* means "In the place of a parent . . . charged, factitiously, with a parent's rights, duties, and responsibilities." BLACK'S LAW DICTIONARY, *supra* note 2, at 708.

187. *State v. Pendergrass*, 19 N.C. (2 Dev. & Bat.) 365, 365-66 (1837). N.C. GEN. STAT. § 110-44.1 (1991) states: "[A]ny child under 18 years of age . . . shall be subject to the supervision and control of his parents."

188. *Drum v. Miller*, 135 N.C. 204, 208, 47 S.E. 421, 425 (1904); *see* N.C. GEN. STAT. § 115C-390 (1991) (declaring that school personnel may use reasonable force); *Gaspersohn v. Harnett County Bd. of Educ.*, 75 N.C. App. 23, 27-28, 330 S.E.2d 489, 493 (1985).

189. 3 LEE, *supra* note 158, § 249, at 321; *see also* N.C. GEN. STAT. § 7A-517 (1989 & Supp. 1991) (defining "abused juveniles" in the juvenile code); *id.* § 14-318.2 (1986 & Supp. 1991) (declaring child abuse a general misdemeanor); *id.* § 14-318.4 (1986 & Supp. 1991) (declaring child abuse a felony).

190. Protective custody would be available for children with temporary, but routine, injuries.

191. In *Hawkins v. Hawkins*, 331 N.C. 743, 417 S.E.2d 447 (1992), a plaintiff brought suit against her adoptive father for assault and battery. *Id.* at 744, 417 S.E.2d at 448. The defendant had sexually abused the plaintiff from the time she was five and a half until she was four-



This Note does not condemn the actions of the North Carolina Supreme Court. If anything, it is commendable that our courts are "alive to the demands of justice."<sup>192</sup> As Justice Meyer indicated, it would seem unconscionable not to allow these girls to recover damages for their physical and emotional pain.<sup>193</sup> *Holt* is a significant case for both its substantive holding and for how it treated precedent. It remains very unclear, however, how the holding of the court will be applied in the future.<sup>194</sup> But in the future, there are other options.

Realizing that it is unlikely that the North Carolina courts will overturn past decisions requiring them to defer to the General Assembly on this issue, the North Carolina General Assembly must react to the pleas of the courts. The General Assembly should enact North Carolina General Statutes Section 1-539.22, either to make a plain statement about the viability of the parent-child immunity doctrine and the effect of *Holt*<sup>195</sup> or to abolish all vestiges of the doctrine.<sup>196</sup> If the General Assembly abolishes the doctrine, existing constitutional, statutory, and case law in North Carolina will fill the remaining void adequately, thus protecting the interests of parents, children, and society.<sup>197</sup> This State should not

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teen. *Id.* The action was allowed. *Id.* Presumably, the defendant did not plead parent-child immunity as an affirmative defense. This case is important because it allowed the daughter to recover \$25,000 in punitive damages, even though no compensatory damages were awarded. *Id.* "The jury, as trier of fact, found that plaintiff had in fact established her cause of action for assault and battery. Plaintiff was, therefore, entitled to recover at least nominal damages. This entitlement is sufficient to support the award of punitive damages." *Id.* at 745, 417 S.E.2d at 449.

192. *Holytz v. City of Milwaukee*, 17 Wis. 2d 26, 39, 115 N.W.2d 618, 625 (1962) (quoting *Hargrove v. Cocoa Beach*, 96 So. 2d 130, 132 (Fla. 1957)); see *supra* note 145.

193. *Holt*, 332 N.C. at 98, 418 S.E.2d at 515 (Meyer, J., concurring in result).

194. See *supra* note 134 and accompanying text.

195. For instance, the statute could read:

§ 1-539.22. Parent-child immunity.

The relationship of parent and child shall bar only rights of action by a person or his estate against his parent or child for wrongful death, personal injury, or property damage based on ordinary negligence.

or

§ 1-539.22. Parent-child immunity.

The relationship of parent and child shall bar all rights of action by a person or his estate against his parent or child for wrongful death, personal injury, or property damage, except in cases involving sexual abuse. The standard of proof should be raised in such a case to clear, cogent, and convincing evidence.

196. For instance, the statute could read:

§ 1-539.22. Abolition of parent-child immunity.

The relationship of parent and child shall not bar the right of action by a person or his estate against his parent or child for wrongful death, personal injury, or property damage.

197. See *supra* notes 180-91 and accompanying text.

remain the notable exception to the growing list of jurisdictions embracing the modern trend of limiting or abrogating the parental immunity doctrine.<sup>198</sup>

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198. See *Lee v. Mowett Sales Co.*, 76 N.C. App. 556, 565, 334 S.E.2d 250, 256 (1985) (Becton, J., dissenting).